IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0171 of 2016
[In the High Court at Lautoka Case No. HAC 111 of 2012]

BETWEEN	**:**	**EPELI SAUKURU**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Andrews, JA** **Andrée Wiltens, JA**
Counsel	**:**	**Mr. M. Navunisaravi and Mr. M. A. Khan for the Appellant** **Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**02 September 2024**
Date of Judgment	**:**	**27 September 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant (and the co-accused) had been indicted in the High Court of Lautoka on one count of Rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of Assault with Intent to Commit Rape contrary to Section 209 of the Crimes Act, 2009 committed at Nadi in the Western Division on 25 August 2012 on the same complainant.

[2] At the close of the summing-up[1], the assessors had returned with a divided opinion. Two assessors had found the appellant (and the other) guilty of all the counts as

[1] **State v Natuitagalua** - Summing Up [2016] FJHC 937; HAC111.2012 (3 October 2016)

charged in the information while the remaining assessor had found the appellant not guilty of all the counts he was charged with.

[3] The learned trial judge agreed with the majority opinion and convicted the appellant (and the co-accused) as charged in his judgment[2] and on 17 October 2016 sentenced the appellant to 13 years of imprisonment on the count of rape and 03 years of imprisonment on the count of assault with intent to commit rape; both sentences to run concurrently with a non-parole period of 11 years[3].

[4] The complainant was seventeen years old at the time of the alleged incident. The evidence led against the appellant in brief is that that the appellant had consumed alcohol with the victim, co-accused and a few others at the house of one Joji on the 25 August 2012. After the drinking party, the appellant, the co-accused, the complainant and one Sitiveni had gone to the Nawaka River to drink more beer. While they were drinking beer, the appellant had pulled and dragged the complainant to a nearby bush and forcefully removed her clothes. She was injured while being dragged to that place. The appellant had then forcefully inserted his penis into her vagina and had sexual intercourse with her without her consent.

[5] A judge of this court considered the appellant's appeal against conviction and sentence but refused leave to appeal against both[4]. The appellant had renewed his appeal against conviction and sentence before the Full Court limiting it to five grounds of appeal which were among those considered at the leave stage, with a slight modification of the original first ground of appeal. They are as follows:

Conviction:

1. *That the learned trial judge failed to direct on what weight should be given to the evidence that was given by the co-accused that implicated the appellant.*

[2] **State v Natuitagalua** - Judgment [2016] FJHC 938; HAC111.2012 (7 October 2016)
[3] **State v Saukuru** [2016] FJHC 940; HAC111.2012 (17 October 2016)
[4] **Saukuru v State** [2020] FJCA 165; AAU171.2016 (14 September 2020)

2. *That the learned trial judge failed to direct on how the evidence of the wife of the first accused should be considered.*

3. *That the learned judge did not sufficiently direct on the inconsistencies of the evidence of the complainant which led to a great miscarriage of justice.*

4. *That the learned judge did not sufficiently direct on the consistency of the appellant's evidence and this led to the acceptance of the prosecution's version of events.*

Sentence:

5. *That the learned judge erred in law and fact when passing a harsh and excessive sentence.*

01st and 02nd grounds of appeal

[6] The appellant has addressed both grounds together on the premise that the trial judge had failed to address the assessors on what weight should be given to the evidence that was given by the co-accused that implicated the appellant. This is similar to his argument at the leave stage that the trial judge had failed to direct the assessors on how the evidence of an accomplice should be considered. Secondly, he has argued that the trial judge had failed to direct the assessors as to how the evidence of the wife of his co-accused should be considered.

[7] The accomplice referred to by the appellant was his co-accused (Apisai Natuitagalua- the first accused). The appellant was the second accused in the High Court. This argument appears to be based on what the trial judge had said [paragraph 111] in the summing-up where he had addressed the assessors on the evidence of the co-accused. "Rosa" referred to by the trial judge in the paragraph is the complainant and "Epeli" is the appellant.

> *'111. When they reached to the mango tree, Rosa also came and sat with them. In a while Apisai went down to answer to the nature's call. When he came back, he did not see Epeli and Rosa. He asked Sitiveni about them and found that both of them had gone up. While he was answering the nature's call, he did not hear any scream of a girl from the direction of the drinking place. He then went up and saw Epeli and Rosa. He just stood up and spoke to them. He then came back and sit*

and continue to drink. When Epeli and Rosa came back, she complained to him about the sexual intercourse she had with Epeli. He then slapped her and told her that she already got her fare and why she was not going back. He saw injuries around the stomach of Rosa.' (emphasis added)

[8] It is clear from the evidence of the appellant and his witnesses as summarized by the trial judge in [paragraphs 132- 146] of the summing-up that the appellant's position had been that he had consensual sexual intercourse with the complainant. What the trial judge had [paragraph 111] summarized as the evidence of the co-accused is not contrary to the appellant's position, as [according to paragraph 111], the complainant does not seem to have told the co-accused that the appellant had engaged in forcible sexual intercourse with her.

[9] In Fiji**,** the treatment of co-accused and accomplice testimony follows principles similar to those found in other common law jurisdictions such as English common law principles, with particular emphasis on cautionary measures when relying on such testimony. Co-accused in a criminal trial may also be treated as accomplices if they testify against their co-accused. In such cases, the courts approach their testimony with caution, acknowledging their potential self-interest in shifting blame or obtaining leniency. In criminal trials in Fiji, the judge is required to give judicial warnings when a co-accused testifies as an accomplice. The judge typically advises the assessors to scrutinize the evidence carefully and be cautious when relying solely on accomplice testimony, particularly where the accomplice may have a vested interest in the trial's outcome. The judge will also remind the assessors that accomplice testimony should be approached with caution due to the possibility that the accomplice might be testifying to reduce their own punishment.

[10] It has been held in Fiji that the law requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated[5]. Although the common law rule about accomplice warnings is a rule of law, and in the ordinary case the requirement for a warning does not depend upon a request being made by trial counsel, the rule is not so mechanical as to call for a warning in every

[5] **Singh v The State** [2006] FJSC 18; CAV0007U.2005S (19 October 2006);

case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case. The application of the rule must be related to its purpose, and will require a consideration of the issues as they have emerged from the way in which the case has been conducted[6]. Needless to say, independent evidence that supports the accomplice's account increases the likelihood that the testimony will be considered reliable by the court. The onus remains on the court to guide the assessors properly, ensuring they understand the risks of relying solely on the testimony of a co-accused or accomplice.

[11] In **Singh v State** [2018] FJCA 146; AAU134.2014 (4 October 2018) the Court of Appeal further discussed the law relating to accomplice evidence and the current trend in judicial thinking, as follows:

> *[21] Fiji has followed the common law rule of practice, which had crystallized into a rule of law, and adopted by the UK courts for many years that it was obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person when that person is an alleged accomplice of the accused.*
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> *[22] It is of interest however to take note of the development of the law in regard to accomplice evidence in the UK, Canada and Seychelles. In the UK, the requirement that it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of an alleged accomplice has now been abrogated by section 32 of the Criminal Justice and Public Order Act of 1994.*
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> *[23] In the Canadian Supreme Court case of **Vetrovec –v- The Queen** **[1982] 1 SCR 811**, it was said*
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> > *"None of the arguments put forward to look for corroboration of accomplice evidence can justify an invariable rule regarding all accomplices. All that can be said is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witnesses. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of law of evidence a blind and empty formalism. Rather than attempt to pigeon-hole a witness into a category and then recite a ritualistic incantation, the Trial Judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his*

[6] **Jenkins v R.** [2004] HCA 57; (2004) 211 ALR 116 at 121 –122

judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary."

[24] The Court of Appeal of Seychelles said in the cases of ***Jean Francois Adrienne & another –v- The Republic*** ***CR App SCA 25 & 26/2015*** *and the case of* ***Dominique Dugasse & others –v- The Republic [SCA 25, 26 & 30 of 2010]****: that it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and that it should be left at the discretion of judges to look for corroboration when there is an evidential basis for it.*

[25] Reference was made to such an evidential basis by ***Lord Taylor C.J. giving the judgment of the court in Makanjuola, 1995 1 WLR 1348 and R –v- Easton 1995 2 Cr. App. R. 469 CA*** *when he said:*

"Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."

[12] There is no prohibition against one accused giving evidence against another at the trial. This can always happen in the case of conflicting defences taken up by multiple accused. What is barred is to use what one accused had stated in a cautioned police statement against another accused at the trial. It was held in **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) by the Court of Appeal:

*'[37] ……. It is trite law that a reference made in a caution statement by one accused cannot be made use of against another accused. It is also trite law that if an accused while testifying on oath at the trial implicates another accused that will be evidence against the other accused. It may be in the form of an admission that he committed the crime along with the other accused or it may be in the form of a 'cut-throat defence' (**R V Turner & Others** [1979]70 Cr App R 256; **R V Varley** [1982] Cr App R 242; **Bannon V Queen** [1995] 185 CLR 1) where he implicates the other accused in the crime exonerating himself. It is my view that where an accused corroborates the evidence of another accused or gives evidence favourable to any of the other accused; that is also evidence that must be considered by the Assessors and the trial Judge in coming to a finding against the accused……"*

[13] Given that the appellant's position was that of consensual sex and his co-accused's evidence did not contradict this position, I do not think that the usual warning on accomplice evidence was needed in this case.

[14] The appellant argues that there was no direction on how to assess the weight to be attached to the evidence of the wife of the co-accused and therefore that omission had resulted in more suspicion being cast on the appellant.

[15] I think this submission is based on the evidence of the co-accused's wife that the co-accused Apisai has certain objects in his penis namely marbles and due to these objects, she receives injuries in her vaginal area whenever she engages in sexual intercourse with him. Dr. Baladina who had examined the co-accused had said that there could have been laceration if a seventeen years old girl had forceful sexual intercourse with a man having a penis containing foreign objects on three occasions but it would depend on whether she was aroused and ready for sexual intercourse or had given birth to a child etc. However, Dr. Anareta had explained in respect of the foreign objects inserted in the penis of the co-accused that if he raped the victim twice with his penis with foreign objects, still the tearing or laceration of the vagina would depend on the force and the aggressiveness of the penetration.

[16] The appellant seems to suggest that because the medical evidence was inconclusive as to forcible sexual intercourse in explaining the old blood around the complainant's vaginal canal thus not being able to attribute it to the presence of marbles in the first accused's penis, there was a possibility of the assessors casting more suspicion on the appellant having had sexual intercourse with the complainant without her consent attributing blood around her vaginal canal to his act of sexual intercourse. This, I think is a rather far-fetched theory in the light of the totality of medical evidence where *inter alia* Dr. Anareta had explained that if the co-accused had raped the complainant twice with his penis with foreign objects, still the tearing or laceration of the vagina would depend on the force and the aggressiveness of the penetration. The majority of assessors in the end had seemingly decided, independent of medical evidence and the evidence of the first accused's wife, that both accused had engaged in forcible sexual intercourse with the complainant despite the appellant's defence of

consensual sex and his co-accused's defence of total denial. I shall further discuss medical evidence dealing with the 3rd and 4th grounds of appeal.

03rd and 04th grounds of appeal

[17] The appellant submits that the trial judge had mentioned the existence of inconsistencies in the evidence of the complainant but not sufficiently directed the assessors on them. Regarding the submission of counsel for both parties that there had been inconsistencies in the prosecution and defence cases the trial judge had stated as follows:

> *177. I will now explain you the purpose of considering the inconsistent nature of the evidence given by a witness in court and the previously made statement by the same witness. You are allowed to take into consideration about such inconsistencies and the omissions when you consider credibility and reliability of the evidence given by the witness.*
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> *178. The evidence is what a witness told us in court on oath/affirmation. If you are satisfied that a witness has made a statement which is in conflict with his evidence given in court, you may take into account that inconsistency when you determine the credibility and reliability of the evidence given by the witness.*
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> *179. In examining suggested inconsistencies, you have to first determine whether there is in fact and in true context, an inconsistency; and if you decide that there is one, then you have to decide whether it is material and relevant or, on the other hand insignificant or irrelevant. If there is an inconsistency, it might lead you to conclude that the witness is generally not to be relied upon; alternatively, that a part only of his/ her evidence is inaccurate; or you may accept the reason he has provided for the inconsistency and consider him to be reliable as a witness.*

[18] In the course of the summing-up, while summarizing the evidence of the prosecution witnesses, [paragraphs 31-104] the trial judge had highlighted not only the evidence but also the inconsistencies in their evidence.

[19] In this context, the appellant's counsel placed a great deal of emphasis on the history at D (10) in the complainant's Medical Examination Form (MEF) where she had purportedly told the doctor *inter alia* that two boys put a sack on her head, punched

her on the face and she lost consciousness. However, she had also said that after she awoke three boys raped her several times and one tried to stop them before she escaped. She had frankly admitted in her evidence that this narrative was somewhat different to her testimony and that she was really drunk and may have given a wrong statement to the doctor, but she could not exactly recall what she told the doctor. Thus, what is stated under D (10) in MEF can have little adverse effect on the complainant's credibility. In any event, medical practitioners are able to give evidence of what the complainant said during the course of an examination but the purpose of any such conversation is not to prove the truth of what the complainant said happened, but to indicate the reason why the medical practitioner examined particular parts of the complainant's body[7]. On the other hand the history recorded by the doctor in this instance cannot be legally treated as a recent complaint evidence (as argued by the appellant) as the complainant had not admitted having said the same to the doctor and could not even recall what she told the doctor due her drunkenness, for procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint[8].

[20] DC Gupta, the investigating officer had stated in his evidence that when they visited the complainant on the day of the incident within a few hours, she was heavily drunk, physically and mentally disturbed and not in a position to answer the questions and he and WDC Grace left without recording a statement which was done on the following day. WDC Grace had filled the MEF [*i.e.* background information under A(4)] on information provided by a staff nurse and therefore the complainant's credibility cannot be assailed by referring to what WDC Grace had recorded in the MEF based on what she had heard from an unidentified staff nurse. Thus, the evidence of DC Gupta clearly shows the condition of the complainant even when she had given the history to the doctor and also corroborates her position that given her drunken state she may have said what she told the doctor. Therefore, it is quite understandable why the assessors and the trial judge decided to treat her as a credible and reliable witness

[7] **Ramsay v Watson** [1961] HCA 65; (1961) 108 CLR 642 at 649); **Koroitamana v State** [2018] FJCA 89; AAU0119.2013 (5 June 2018)
[8] **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)

despite the inconsistency of her testimony with the history given to the doctor or what WDC Grace had written in the MEF.

[21] Thus, I do not find the summing-up to be obnoxious to the sentiments expressed in **Prasad v State** FJCA 77; AAU0013U of 2002 (30 August 2002). In fact the Court of Appeal later remarked in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) on inconsistencies, contradictions and omissions which are equally applicable this case as well.

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'.*

[22] The appellant's counsel also highlighted Dr. Anareta's evidence under cross-examination that if she were to take only the findings and observation of the vaginal examination into consideration, then it is most likely that the complainant would have had consensual sex as buttressing the appellant's stand that he had consensual sex with the complainant. Therefore, in order to understand Dr. Anareta's statement in the context of the totality of her evidence, I shall examine the medical evidence in detail.

[23] Dr. Anareta had found multiple abrasions on both sides of the inner thighs as well as at the front interior of the complainant's thighs. According to the doctor, abrasion could be caused by grazing of the skin against a rough surface or a fall against a rough surface and that dragging could cause multiple abrasions. She also had said that abrasion could not be caused by hard pressing on the thighs and that the pain of the joints and headache that the complainant complained about could be a manifestation of those injuries that she had sustained. However, if there was no force in slapping, that would not make any injuries on the skin. The doctor had also done a neck

examination where she found bruises at the left lateral aspect of the neck which could be caused by any blunt trauma. If there was strangling, then there would be bruising on both sides of the neck. If the strangling was done with limited force, then it would be difficult to ascertain as any marking of bruising would be depend on the force that was applied on the victim. The doctor did not find any superficial injuries on the back side of the complainant. No facial injuries were noted either. The complainant had not complained about any facial tenderness or any pain, neither had she complained about chest pain. According to Dr. Anareta, if the complainant was dressed in a mini short and went through bushes with para grass, trees, debris etc. she would have got abrasion not only on her upper thighs, but lower leg as well. If she put her legs up and was dragged, she would sustain injuries to her thighs and lower abdomen. If there were stones on the ground, she would have sustained laceration as well.

[24] The other key points raised in Dr. Anareta's evidence is also necessary and useful to understand the appellant's complaint.

- *Old blood around the perineum area. The possible causes for the old blood around perineum area are either due to micro injuries not visible to naked eye which can be caused by force or aggressive penetration via a blunt object* ***or*** *forceful penetration that was not severe enough to cause visible injuries* ***or*** *some blood expelled from uterus into the vagina during the menses but Dr Anareta had not asked the complainant whether she just finished her menses circle. She could not confirm the reasons for the existence of old blood with brownish red colour around perineum and vaginal vault.*

- *The colour of the blood was brownish red. By the colour of the blood it could not be determined whether the blood found around perineum was due to micro injuries or due to the menses as blood changes colour as time progress due to the loss of oxygen in the blood.*

- *No active bleedings, no laceration, no tears were found during the vaginal examination.*

- *The offence of rape has been commonly misunderstood as if when there were no visible vaginal injuries, then there was no rape. Every victim of rape does not have visible vaginal injuries. Rape is not giving consent and victims are not able to give consent for a few reasons, such as being unconscious, is sleeping, too frighten to resist or too drunk etc.*

- *Even consensual sexual intercourse could cause vaginal injuries. It depends on the force and aggressiveness of the penetration. If the victim struggled or fought to get away, then there could be more forceful penetration to the vagina resulting in injuries. In the case of no resistance, and less force, then it could only result in micro vaginal injuries. If a victim is raped multiple times, vaginal injuries still depends on the force and aggressiveness of the penetration and the level of resistance by the victim. More the victim resist the more the force of penetration needed, leading to vaginal injuries.*

- *If the hymen is intact, the victim would not be sexually active. The determination of the status of hymen was one of the purposes of this examination. Dr Anareta stated that usually she makes specific mention of the hymen in the medical report if it can be easily visualized to determine whether it is intact or not but she agreed that in this case, she had not mentioned anything about hymen in the medical report.*

- *The vagina is able to elongate. When a woman is sexually aroused, the vagina elongates in order to receive the penis. However, it does not necessarily and automatically lubricate when a woman is sexually aroused. Vagina could not be elongated without being aroused. Dr. Anareta explained that if the vagina is elongated but not lubricated, it could be a painful and dry penetration. However, such painful and dry penetration does not automatically cause visible tearing and it would depend on how well the vagina is elongated and accommodate the penis into it. If such dry penetration occurs for about five minutes, it could lead to micro injuries or visible injuries in the vagina. Dr Anareta said that no tears or laceration were found during the vaginal examination, but there could be micro injuries which she was not able to confirm as Fiji has no facilities to conduct colposcopy or staining test in order to determine the existence of micro injuries.*

- *If the victim is highly engaged in sexual activities, the possibility of causing injuries in vagina is minimum even without elongation. If the victim is very much active in sexual activities, the vaginal cavity could accommodate the penetration of a penis. It depends on how big the vaginal opening. The muscle of the opening of vagina is bit looser if a person is very much sexually active. It depends on how loose the muscles around it are. It would be more difficult for a person who has not been sexual active to receive a penis into the vagina than a person who has been very much engaged in sexual activities. If a forcible penetration took place into the vagina of a victim when her vagina is not elongated due to lack of arousal, it could lead to micro vaginal injuries or visible injuries but it could not be confirmed whether the victim had actually sustained micro injuries in her vagina as Fiji has no facilities to conduct colposcopy or staining test.*
- *Dr Anareta said that if she were to take only the findings and observation of the vaginal examination into consideration, then it is most likely that*

the victim would have had consensual sex. However, consensual sexual intercourse too could lead to vaginal injuries.

[25] Therefore, Dr. Anareta's medical findings that multiple abrasions on both sides of the complainant's inner thighs as well as at the front interior of the thighs could be caused by grazing of the skin against a rough surface or a fall against a rough surface and that dragging could cause multiple abrasions, seems to provide some independent corroboration to the complainant's narrative and militate against the appellant's version of consensual sex. Similarly, Dr. Anareta's evidence that the complainant was wearing a sulu covered in dirt, her top was torn and wore no undergarments when she came to the hospital also lends more credibility to her testimony of forceful sex and undermines the appellant's defense.

[26] However, is very clear that (as also agreed by the appellant's counsel at the hearing) that the medical evidence in its totality is inconclusive as far as forceful penetration is concerned. Dr Anareta neither confirms nor denies such a possibility. Her statement that if she were to take ***only*** the findings and observation of the vaginal examination into consideration, then it is most likely that the victim would have had consensual sex, cannot be taken in isolation. Dr Anareta's opinion, heavily relied on by the appellant's counsel, itself suggests that it is based purely on the assumption as if she were to take only the findings and observation of the vaginal examination into consideration. However, the totality of her evidence demonstrates that her overall view presents a much broader picture but in the end is inconclusive as to whether sexual intercourse was consensual or not. Thus, it is not possible to confine Dr Anareta's evidence to her view based only on a certain hypothesis.

[27] In general, the trial judge had directed the assessors on the evidence of Dr. Anareta [paragraphs 66-89] and Dr. Baladina Kavoa, who only examined the co-accused, at [paragraphs 123 and 124] and finally summed-up to the assessors on how to approach the medical evidence said as follows:

'156. In this case you have heard the evidence of Dr Anareta, who was called by the prosecution as an expert in the field of medicine and Dr Baladina who was called on behalf of the first accused person. Dr

Anareta in her evidence explained and gave her professional opinion about the medical findings that she found during the medical examination of the victim. She further gave her expert opinion about the foreign objects inserted in the penis of male. Dr. Baladina has examined the penis of first accused person and tendered a report of it. She explained in her evidence about the foreign objects that she examined in the penis of the first accused person during her examination

157. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the victim subsequent to this alleged offence and also the foreign objects inserted in to the penis of the first accused and its impact in sexual encounters.

158. With regard to these particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/ or to come to any conclusions on those issues on the basis of your own observations or experiences. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.'

[28] The trial judge had also considered medical evidence in paragraphs 33-36 and 38 of the judgment. I do not think that there is any deficiency on the part of the trial judge in dealing with the medical evidence either in the summing-up or in the judgment as the trial judge is not expected to repeat everything he had stated in the summing-up in the judgment as long as he had directed himself on the lines of his summing-up to the assessors[9].

[29] The appellant also complains that the trial judge had not directed the assessors sufficiently on the consistency of the appellant's evidence. The trial judge had summarized the evidence of the appellant [paragraphs 131- 148]. Then, he had in detail analyzed the evidence of the defense witnesses including the appellant [paragraphs 05-27 of the judgment] and stated why the defense had failed to create a reasonable doubt. In Fiji, the assessors are not the sole judge of facts. The trial judge

[9] **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)

is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not[10].

[30] When examining whether a verdict is unreasonable or cannot be supported by evidence, the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including defence evidence, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether, upon the whole of the evidence, it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors ***must*** as distinct from ***might***, have entertained a reasonable doubt about the appellant's guilt[11]. While giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses[12], this court evaluated the evidence and made an independent assessment thereof[13] and I am convinced that the assessors as well as the trial judge could have reasonably convicted the appellant on the evidence before them[14].

08th ground of appeal (sentence)

[31] The appellant's challenge is based on a misunderstanding of the tariff applied by the trial judge. He argues that it should have been 07 years as the starting point as the complainant was 17 years of age; and also that the trial judge had not given sufficient weight for the mitigating factors.

[10] ***Fraser*** (supra)
[11] **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)
[12] **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)
[13] **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)
[14] **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 (14 March 2013)

[32] The trial judge had correctly applied the tariff for juvenile rape (under 18 years of age) based on **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) which was 10-16 years of imprisonment. The judge had selected 13 years as the starting point and reduced that by 02 years for the previous good character and relatively young age (which the appellant did not deserve at 32 years of age). In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court said that the tariff previously set for juvenile rape in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years.

[33] When a sentence is challenged on appeal the guidelines to be followed are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations[15].

[34] I am also mindful of the general principles referred to in **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024) as to when the appellate court would interfere with a sentence imposed by the trial court.

1. *Interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed.*

2. *Interference with the sentence imposed can only be done where there has been an irregularity that results in the failure of justice.*

3. *An appellate court may not interfere with the trial court's discretion merely because it would have imposed a different sentence. It must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not.*

[35] Similarly, when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered and even if the starting point was too high, it does not follow that the sentence ultimately imposed

[15] **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015

will be one that falls outside an appropriate range for the offending in question[16]. The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range[17]. I do not think that the ultimate sentence irrespective of the methodology applied in the sentencing process is disproportionate, harsh or excessive.

[36] Following the usual practice of this court, in addition to the question of leave to appeal, I have considered and found no merit in the appellant's appeal against conviction and sentence and therefore, the appeal against both stand dismissed.

Andrews, JA

[37] I have read and agree with the judgment of Hon. Justice Prematilaka, RJA.

Andrée Wiltens, JA

[38] I concur with the decision and the reasons for that.

[16] **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]
[17] **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.
3. Appeal against conviction is dismissed.
4. Appeal against sentence is dismissed.

Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Madam Justice P. Andrews
JUSTICE OF APPEAL

Hon. Mr. Justice G. Andrée Wiltens
JUSTICE OF APPEAL

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